United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1434

TO BE ARGUED BY:

STEPHEN M. LATIMER
DANIEL L. ALTERMAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1434

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

MICHAEL KERN, et al., individually and as Justices of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; JAMES MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County, et al.,

Defendants-Appellants.

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BRIEF OF APPELLEES

ISSUES PRESENTED

1. Does the lengthy delay in bringing incarcerated defendants in Kings County to trial, caused by the long-standing failure of the criminal justice system to provide adequate resources to cope with a large number of indictments, violate appellees present and continuing right to a speedy trial under the Sixth and Fourteenth Amendments?
2. Does the excessively long pretrial incarceration without judicial determination of guilt or innocence suffered by appellees deny them due process of law?

3. As a federal court which sits to protect federal constitutional rights, does the District Court have the power and the responsibility to remedy the present and continuing violation of appellees' rights to a speedy trial?

4. Did the District Court sitting as a court of equity properly exercise its discretion when it issued a preliminary injunction to prevent appellees' present and continuing right to a speedy trial from ripening into a completed violation of that right?

STATEMENT OF THE CASE

Nature of the Case

This appeal poses fundamental questions concerning the ability of indigents accused of serious crimes to obtain protection of their basic constitutional rights. It arises from a class action in the United States District Court for the Eastern District of New York by indigents detained for long periods of time in institutions under the care, custody and control of the Department of Correction who are awaiting trial in Kings County on felony charges. Seeking declaratory and injunctive relief, the amended complaint alleges systematic and widespread denial of constitutional rights to, inter alia, a speedy trial, effective assistance of counsel, unabridged access to courts, reasonable bail, due process and equal protection of the laws.

Defendants include all the state and city personnel that are responsible for the delivery of criminal justice in

the Kings County Supreme Court: The judges, the clerks, the District Attorney, and the Department of Correction.

A motion to dismiss the complaint was denied by the Hon. Orin Judd, first in part on February 15, 1973 and then in toto on February 27, 1973. At that time the court certified the suit as a class action.

Appellees moved for a preliminary injunction on the alleged denial of effective assistance of counsel by the Legal Aid Society and the refusal of the clerk of the Criminal Term of the Kings County Supreme Court to entertain pro se motions. On May 10, 1973, after exhaustive hearings the District Court entered a decision and order in response to plaintiffs' motion for preliminary relief. The court found that "the Criminal parts of the Kings County Supreme Court are in a state of deep crisis" and "that Legal Aid attorneys have excessive caseloads and that conditions under which they must work are shocking." (Wallace v. Kern, May 10, 1973, Judd, J. Opin., p. 5, 33). The District Court enjoined the clerk of the Supreme Court, Kings County, from refusing to place pro se motions on the court's calendar, and enjoined the Legal Aid attorneys from accepting more that 40 cases per lawyer.

An expedited appeal to this court was taken by the appellants, the Justices of the Supreme Court, and the Legal Aid Society. (Docket No.'s 73-1826, 73-1830, 73-1831). On June 27, 1973, this court reversed on jurisdictional grounds without reaching the merits. 481 F. 2d 621 (1973), cert. denied, ___ U.S. _____, January 7, 1974.

Appellees then moved for a preliminary injunction

to afford them speedy trials. On July 20 and July 25, 1973, the District Court conducted hearings on plaintiffs' speedy trial claims. The evidence shows that "the problem of trial delays in Kings County Supreme Court is one of long standing." Memorandum of Decision, E.D.N.Y., March 7, 1974, p. 3 (hereinafter cited as Opin.) In December 1972, there were 644 defendants who had been confined for more than six months without trial, despite the presumption of innocence, solely because of their inability to raise bail. As of the July hearings, the figure had increased to 707 persons awaiting trial for periods over six months; many indigents being detained over one year, awaiting trial in Kings County. Despite the fact that the administrative judge of the Supreme Court testified that the policy is to provide speedy trials the District Court found that the "defendants still are not being tried promptly. (Opin., p. 10).

On March 7, 1974, the District Court issued its decision granting the motion for preliminary relief. In a supplemental memorandum of March 8, 1974, the court noted that it received a memorandum from the appellant District Attorney, Kings County, that the number of people awaiting trial longer than six months in Kings County, Supreme Court was now 398 persons. The court, however, noted that approximately 8 months had elapsed between the hearings and its opinion and that although the reduction in the backlog was an "improvement ... but it still falls far short of (providing) speedy trials" to indigents. (Opin., p. 14). The court went on to say that it is impossible to predict how long it may take the new machinery

to correct conditions which have existed, for a considerable period of time in Kings County.*/

Noting that trial delays in Brooklyn systematically deprive indigents of fundamental and basic rights, the District Court issued its order on March 26, 1974 which more specifically set forth the terms of its preliminary injunction. It directed that all defendants other than those accused of murder who have been held in custody for more than six months without trial be brought to trial within forty-five days after a written request. If trial has not begun, they are to be released on recognizance. Murder indictees would be permitted to file a written request only after being incarcerated nine months. To prevent abuses the court ordered that certain delays specified in the State's Criminal Procedure Law §30.30 (4)(a) would toll the forty-five day period. The Court being cognizant of the fact that some scheduling of the implementation of its decision was necessary, made its order immediately applicable only to those detainees incarcerated for more than one year.

On March 29, 1974, the District Court denied appellants' motion for a stay as to the substantive terms of the order but

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*/ These figures submitted to the District Court were taken from the Department of Correction's print-out and have not been subject to cross examination by plaintiffs' attorneys. In lieu of the past discrepancies in statistical information, we have no way of knowing whether they accurately reflect the true situation in Kings County.

granted a short stay as to the notice provisions of the order until April 3, 1974. On April 2, 1974, this court granted both a stay and an expedited briefing schedule and ordered briefs to be filed by April 22, 1974. Plaintiffs' application to dissolve the stay was denied by Hon. Thurgood Marshall, Supreme Court Justice for the Second Judicial Circuit on April 9, 1974.

Statement of the Facts

1. Length of Delay and Assertion of the Right:

Lengthy pretrial delays have long been endemic to the Kings County Supreme Court, and the record below indicates that little has changed to rectify the state's continuing inability to provide prompt trials to pretrial detainees. Furthermore, though delays in Kings County are chronic and not chargeable to the criminal defendant, his assertion, through counsel or pro se, of the Sixth Amendment right to a speedy trial falls on deaf ears within the state system, and he is left completely without adequate remedy.

In February, 1973, Samuel Dawson, Assistant Attorney-in-Charge of Legal Aid's Kings County Supreme Court Office, termed long pretrial detention as "typical"[*/] (W1, 36-37). He noted that only three or four Legal Aid cases nad been tried in four new speedy trial parts since their inception in September 1972 (W1, 293). Legal Aid attorney Robert Miller said

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*/ Hereafter, references to the hearings in Wallace v. Kern conducted on February 21 and 22, 1973, will be indicated by "W1" followed by the page number. References to the July 20 hearing will be hereinafter indicated by "W2" and the July 25 hearing as "W3". References to the consolidated hearings held in McLaughlin v. Legal Aid Society on April 18,19,30,1973 will be referred to as "M" followed by the appropriate page number.

that it takes some cases "several years" to be tried and that speedy trial motions were "routinely denied" (W1, 93-94, 84-87).

Joel Walter, another Legal Aid attorney, now working in the federal court, compared federal practice with his Brooklyn Supreme Court experience: In the federal courts it was rare for an accused to be detained 90 days without a trial, while in the state it was "sometimes 14-15 months" before an incarcerated defendant was tried. (W1, 229).

Plaintiff Barry Wilson testified that he was arrested on April 3, 1972, marked "ready and pass" on December 27, and had not been to court from that date to the date of the hearings, February 22, 1973, a period of nearly 11 months since his arrest. (W1, 169, 197-198).

Plaintiff Wilbert Donald testified that he was arrested on February 4, 1971 (W1, 239); 2 months after his arraignment he made a court appearance in which he told the judge directly that he wanted a speedy trial, and was thrown out of court (W1, 246-248); he plead guilty in November, 9 months after his arrest. On March 9, 1972, he was both sentenced and re-arraigned on a charge previously dismissed some 10 months before (W1, 251-253). Donald was not moved for trial until some 9 months later, and then only after a federal District Court considered his petition for habeas corpus and directed the state court to begin trial within 60 days. A justice of the Supreme Court allowed his attorney to resign, gave his new lawyer a weekend to prepare, and moved the case to trial forthwith. Plaintiff, plead guilty on December 9, 1972, 22 months after his arrest. (W1, 267-277, 281).

Long pretrial delays and denial by the state courts of effective relief to members of appellees' class showed no improvement in April. The hearings held on April 18, 19, and 30, 1973, opened with a reference by the court acknowledging receipt of two pro se habeas petitions from detainees incarcerated in the Brooklyn House of Detention, alleging 8 and 11 months of pretrial delay. (M, 243-244). The court subsequently noted that the Judicial Conference found that there were almost 12,000 indictments handed down in fiscal 1972, with only 71 cases tried thus far in 1973. (M, 291). Legal Aid attorney Florence Barna saw the lack of speedy trials as a prime problem in Kings County, as did former Legal Aid President and Chairman of the State's Temporary Commission on the Courts, Robert Patterson. (M, 288, 641).

Legal Aid Director of Court Operations and Assistant Attorney-in-Charge, William Gallagher (now director of the Criminal Defense Division) said that there were "no speedy trials at all" in Brooklyn. (M, 321).

Gallagher stated that as of December 1, 1972 there were 644 defendants incarcerated without trial for six months or more. (M 455). He further testified that whereas in the federal system a trial could be had within 4 months, it normally took eighteen months to two years to get a trial in Kings County. (M 384). He further testified that Supreme Court justices refuse to grant speedy trial motions. Instead, after a lapse of time, usually beginning at 6 or 7 months, bail applications would begin to be granted; however, he did not say with what degree of frequency defendants were able to secure their

release from detention. (M, 374). According to Gallagher, the Society brought 400-600 speedy trial motions in the summer of 1972; this led to bail conferences with the District Attorney, in which 202 defendants were released while the rest of the applications were denied (M, 321, 335-6, 455). On the whole, Gallagher thought that most defendants wanted a speedy trial (M, 496).

Sam Dawson reviewed for the court the last cases tried in each of 6 so-called Legal Aid trial parts on April 30, 1973. He testified that delays ranged from 11 3/4 months to 27 1/2 months for jailed defendants and from 15 1/2 months to 26 months for defendants out on bail. (M, 734-7, 739-40, 743-44, 749-50). The most recent trials were far from being the oldest cases - widespread "jumping" of cases was indicated. Two trial parts are typical of how the system brings on cases for trial. In part 6, the case on trial jumped over 13 older jail cases and an unknown number of older bail cases, and the trial in Part 9 skipped 40 older jail and bail cases, being selected from the reserve rather than the ready calendar. (M, 734-37, 749-50, 754).

Thomas Chittendon, Director of the Management Planning Unit of the State's Judicial Conference testified for appellants that the system could try only 5-6% of its cases, and that Kings County received the lion's share of the State's Emergency Felon Processing Program (EFPP) money because of the severity of the problem. (M,432, 436).

On July 20 and 25, 1973, the District Court conducted hearings in Wallace on the speedy trial issue and there is abun-

dant testimony on the systematic denial of plaintiffs' Sixth Amendment rights. Samuel Dawson was called again and testified that trial delays and jumping of cases were essentially unchanged (W2, 25-30, 37, 45). He further testified that in December 1972 "several hundred" more speedy trial motions were brought by Legal Aid. Instead of deciding the motions, cases were conferenced with a view toward plea bargaining. Dawson knew of no plan to continue or renew the process. (W2 30-34).

An amicus curiae brief of the New York City Board of Correction submitted to the District Court showed that as of July 9, 1973, 707 persons were incarcerated for over 6 months without a trial, 210 of whom had been detained for a year or more. (W2, 210).

There was testimony by appellees regarding the customary rejection of their own demands for a speedy trial. Morisell McNair testified to the non-acceptance of his pro se motions and habeas writs by the Kings County motion clerk and Appellate Division. (W2, 100, 103-104). Kenneth Ellis submitted a total of 4 motions and habeas petitions for failure to prosecute to Kings County Supreme Court and the Appellate Division. He too, was given no relief. (W2, 136-139, Plaintiff's Exhibits # 20-27). The District Court found that an affidavit submitted by plaintiffs which was introduced into evidence listed the details of 6 inmates, who were held from 8 to 20 months without trial, despite an aggregate of 14 speedy trial motions. (W3, 2; Opin., p. 4).

The futility of appellees' situation was dramatically demonstrated by Mr. Justice Damiani, who testifying on behalf of

appellants stated, "I think we have done everything that we possibly could with the facilities that we have had." (W3, 26).

2. Reasons for Trial Delay

The problem of trial delays in our urban courts have plagued court officials and administrators. Numerous public officials had failed to anticipate the problems inherent in satisfying the mandate of delivering prompt trials. In June 1969, the Legal Aid Society warned that there must be a "change to permit more effective disposition of the increased caseload within the near future."*/

Sitting in banc this court in 1970, called for amicus briefs to explain the reasons for trial delays. Frizer v. McMann, 437 F.2d 1312 (1971). The Judicial Conference and other interested amici offered many causes for the delay, many of them attributable to state manpower shortages and lack of adequate court facilities, Frizer, at 1314-5. The court noted that the cumulative impact of existing court congestion could be seen by the large number of persons incarcerated for over six months pending trial. Expressing the hope that state courts and authorities would develop their own procedures to reduce trial delays and excessive pretrial incarceration, the court observed that Chief Justice Fuld was sponsoring the promulgation of a set of trial rules that would provide for the release of defendants

*/ - Quoted in the Bar of the City of New York, Special Committee on Legal Aid 52 (1972).

after 90 days of pretrial custody and dismissals of cases not tried within 6 months. This rule was adopted by the Administrative Board of the Judicial Conference to go into effect on May 1, 1972. 22NYCRR 29.1-29.7. Three days before its effective date, the state legislature preempted this directive and adopted a scheme whereby cases merely had to be marked "ready" within the applicable time periods of C.P.L. § 30.30, as amended by L. 1972, Chap. 184. This "ready rule" does not consider the problem of court congestion and inadequate court facilities on trial delay.

In 1972, a large increase in the number of indictments in Kings County, created a backlog that reached alarming proportions. After the Legal Aid Society's attempt at "mass speedy trial motions" proved unsuccessful, the Society brought 4 test cases to the New York State Court of Appeals. The Court of Appeals granted trial preferences in thosecases, People ex rel. Franklin v. Warden, 31 N.Y.2d 498, 341 N.Y.S.2d 60 (1973). The court noted that the backlog in Kings County had increased 60% since June 1972 and that its disposition might be considered unfair to other detainees similarly situated, id at 607, but failed to provide a remedy when delay in general is caused by inadequate court facilities.

In 1972, only 341 cases out of almost 12000 indictments were tried in Kings County. (W1, 51, Plaintiffs' exhibit #1). The increase plus the inability of the Supreme Court to dispose of cases in its trial parts led to overlong trial delays of between 14-16 months. Clearly trial preferences for a few deserving defendants was not a plausible solution to the problem.

As the District Court noted ... "The obstacles to obtaining a speedy trial are aggravated by various practices in Kings County Supreme Court." One such practice is that the District Attorney controls the calendar and can pick any one of the first forty cases on the calendar in an individual trial part to bring to trial while defense counsel cannot be adequately prepared on more than a few cases at a time. (Opin., p.8).

There was extensive testimony in support of this finding as well as on the lack of notice to defense counsel and the interplay between calendaring practice and formal compliance with Section 30.30, the so-called "ready rule." (M, 733-5, 736-8, 740-8, 751, 56-7; W1, 34, W2,40-1, W3, 15, W1, 704-7,710; M, 322, 333-5, 353-5, 524).

Additionally, since the calendar is prepared by the District Attorney, the individual trial justice usually plays a "minimal and passive" role in deciding what cases to try and when. (M, 751). According to the administrative justice, criminal defendants are often not produced for trial. (W3, 14). Often when appellees are produced in court their cases are marked "ready and passed" without them going into a courtroom.

An examination of the history of the problem indicates that there are other reasons for trial delay. The criminal justice system has been unable to anticipate the increase in indictments. This lack of planning has created a system that, according to one witness, is not working and in the words of the District Court, in a state of deep crisis. (Opin., p.10).

Confronted with a backlog that has been described by the State Court of Appeals as vast, practices such as calling cases out of their chronological order, inadequate trial notice to attorneys, non-production of jailed defendants, short working days, inadequate record keeping, and an absence of adequate facilities have only aggravated the situation.

Justice Damiani testified about the steps that had been either recommended by the Judicial Conference or enacted by the Legislature to reduce trial delays.(Finding an "emergency of grave dimension in the processing of felony cases" the Legislature enacted a bill (L. 1972, c. 496, §1) that provided $6,700,000, for an emergency felony processing program. The appropriation for this plan was to be shared equally between state and local government.) Justice Damiani further testified that the state has added more trial parts, increased its bullpen facilities and has reduced sentencing backlog. (W3, 8, 13). Public pronouncements to the contrary, the state has not been able to assure speedy trials for those criminal defendants who want them. While there may be some defendants who use delay to their own personal advantage, the testimony shows that most people want speedy trials and cannot get one in Kings County.

3. Prejudice to the Accused

The District Court found that prolonged pretrial detention causes both legal and personal prejudice to detainees. (Opin., p.10). Professor Bernard Segal, qualified as an expert

witness testified that there are five areas of harm that accrue when one is incarcerated for longs periods pending trial.

First, the denial of the right to a speedy trial is the denial of a right which can never be retrieved. The time lost is forever lost.

Second, the oppressive effects that flow from extended pretrial incarceration increase as the length of delay gets longer. For the innocent defendant there can be no compensation. Extended incarceration causes the loss of job and seniority rights and weakens family ties, especially after three months. The actual conditions of incarceration also adversely affect the detainee's right to effective assistance of counsel. (W2, 61-66, 90).

Third are the psychological effects. A detainee's thoughts on his case are generally constructive for the first 90 days, but after that point anxiety sets in, he becomes irritated, hostile and generally embittered. Family visits decrease and the outside world generally tends to forget about him. His memory fades, he loses interest in his case, and in the belief that any defense can be asserted. (W2, 61, 67).

Dr. Sheldon Cholst, a psychiatrist with the prison Health Services Administration at the Brooklyn House of Detention, testified that lengthy pretrial incarceration caused anxiety, bitterness and alienation and described the onset of "resentment bitterness" in those who are ultimately acquitted. The rate of suicide among detainees is 25 times higher than that of the general population and tranquilizers are pervasively used inside the jail. Prison life is generally

debilitating, but the psychological health of persons in an uncertain pretrial detention situation is worse than that of persons in a post-conviction facility. Dr. Chelst stated that, beyond the constitutional issue, "a speedy trial lessens anxiety in general." "I wish there was a situation that I could say (to an anxious and confused detainee) that you have a right, they just cannot allow you to sit here longer than six months without coming up with a definite right to a speedy trial or decision within six months. I think within that time he could adjust. He could work out some approach to his life." (W2, 114-24).

Fourth, long term pretrial incarceration results in substantial and consequential impairment of the effective assistance of counsel. The fact and conditions of confinement directly contribute to this deprivation: there are inadequate opportunities to confer with his attorneys; the circumstances of consultation lack privacy and are pressured by time; and, the detainee is prevented from assisting on his own case in the crucial appects of investigation and gathering of witnesses, especially significant if the detainee comes from a poor or ghetto community. With the deterioration of the lawyer-client relationship there occurs an absolute loss of credibility in the lawyer who is the detainee' only contact with the criminal justice system. Because the family loses confidence in the attorney as well, visits to jail, decrease drastically by both parties after some time. This leads to reliance on other inmates and self; pro se motions are filed, some of which may be detrimental to an accused. The resultant effect is an overall fragmentation of representation. As the length of time

increases so too does the probable loss of evidence: memories fade, transient witnesses disappear and documentary evidence may be lost. When the detainee is finally brought to trial, the impression he is likely to make on a jury is substantially inferior to that of a bailed defendant who comes forward from the audience. (W2, 61, 63-5, 68-71, 76-9).

Finally, beyond its influence on the quality of representation by his counsel, needless pretrial incarceration has a substantial coercive and detrimental effect on the outcome of a case, which has been found to be the "greatest of problems." First, it involves the surrender of substantial rights to a trial and of once credible defenses. Better pleas are offered and accepted as the length of incarceration increases; misdemeanor pleas offered at the beginning of detention would not be accepted, for then there is still concern with legal or factual innocence. Moreover, the District Attorney, by virtue of his control of the calendar, is given an unfair advantage, the coercion of guilty pleas by putting cases off. Finally, there is an adverse impact on sentencing: with the loss of job and residence and the weakening of family ties, it is impossible to receive a favorable presentence report. The testimony of Segal and Cholst, according the court below, was uncontroverted. (W2, 61, 71-75, 79-80, 89).

Every witness who testified acknowledged that long term incarceration induced guilty pleas. Justice Thomas Jones of the Supreme Court testified that incarceration coerced guilty pleas and that the coercion to plead increased with the length of detention. (M, 719, 725).

The testimony of jailed accused revealed both the legal and personal prejudice that they suffer from lengthy pretrial incarceration common to appellees' class.

Randolph Jenkins spoke to four different Legal Aid attorneys a total of twelve minutes at court, never received a visit or any written communication while incarcerated and requests to obtain police records and find witnesses were never pursued. (W1, 324-330).

Wilbert Donald testified that "I was getting kind of fed up with waiting, just being coerced or forced to cop out." Eventually when brought into court, the District Attorney announced his "readiness" to try the case and Donald, despite his attorney being unprepared for trial, was told plead-out or begin trial within 30 minutes. He said his plea of guilty was a "lie." (W1, 251-54).

Kenneth Ellis testified to the decrease in family visits and the growing disbelief in his innocence, the lack of jail visits by his attorneys and the loss of defense witnesses as the duration of incarceration increased. (W2, 131,33,42). Further, he made three court appearances since being marked "ready" even though his case was called twenty-seven separate times. (W2, 140). Mr. Ellis was supposed to enroll in the SEEK program at Queensborough College three days after his arrest; he suffered renewed asthmatic attacks in the Brooklyn House of Detention, two to three times daily, received medication once at night and said it took seven hours to see a doctor if he got sick a night (W2, 142-44). He plead guilty after two years of incarceration to a promise of seven years - an offer which he had previously refused in the early

days of his detention. (W2, 143).

Ronald Singletary testified that he was unaware of scheduled court appearances, was not produced in court from the bullpen, had no time to consult with his attorney, that his two witnesses had moved and that he plead because he "got tired of waiting." (W2, 157-8, 160-63, 169). At the beginning of his twenty-three months of incarceration he told his daughter that he was in the hospital and would be home soon; on the date of the hearing he said his incarceration had affected her "up to the point where I have received mail from her, telling me that she'd rather get hit by a car, because she don't receive enough love at home." (W2, 154, 164).

Morisell McNair stated that at the beginning of his incarceration he kept close contact with his seven witnesses but as time wore-on the contact decreased. Some witnesses disappeared and the memories of other faded. Finally, one witness remained. He also asked his attorney to investigate the facts of the death of the complainant and was told that he could not (W2, 97-99). When first arrested his wife and daughter visited him at least once weekly:

> "[A]fter the first five or seven months, the regularity in the visits started decreasing to maybe twice a month, and after the first year, maybe once a month, and at this point, I don't receive visits from my wife and daughter...At this point I can't say that I have a relationship with my wife and daughter, because of the fact -- in the beginning, my wife felt very strongly of my innocence. Now, since I have been incarcerated sixteen months, she no longer believes in my innocence, my being incarcerated such a long time. If I was innocent I would have been proven guilty by now and discharged" (sic) (W2, 101-2).

During the sixteen months of pretrial incarceration he received four visits from his attorneys and saw the inside of a courtroom three times; the three plea bargains offered decreased in severity of sentence as incarceration increased; he was discharged from his job and a promised position has since been filled: "I feel that the harm that has been done is irreparable, it can't be undone now, especially the effect it had on me and my family."(W2, 104-08). In November 1973, Mr. McNair was acquitted on his most serious charge: he had been detained over twenty months.

Professor Segal, in recommending release on recognizance for all members of plaintiffs' class who have been incarcerated six months or longer, said:

> "It does not give them their speedy trial, but it does seem to me, if the members if (sic) the class were ordered to be released promptly now, they would have a chance to reestablish family contact, the chance to seek employment, the chance to establish permanent residency, which is a sense of stability, the chance to work with one defense lawyer in reassembling of the defense, the chance to press the lawyer more reasonably and more promptly for action on a case." (W2, 81).

POINT I

THE EXCESSIVE PERIODS OF PRETRIAL INCARCERATION SUFFERED BY CRIMINAL DEFENDANTS IN THE KINGS COUNTY SUPREME COURT VIOLATE APPELLEES' CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

A. The Delays Complained of Violate Appellees' Right to a Speedy Trial Under the Sixth and Fourteenth Amendments.

The right of a criminal accused "to a speedy and public trial...," U.S. Const. Amend. 6, serves to protect the fundamental interests of our criminal justice system in preventing undue and oppressive incarceration before trial, minimizing anxiety and prejudice resulting from public accusation, and avoiding the impairment of an accused person's ability to defend himself. Smith v. Hooey, 393 U.S. 374, 378 (1969); United States v. Ewell, 383 U.S. 116, 120 (1966). The consequences of delay can never be fully remedied by post-conviction remedies or dismissal at trial. These interests, and the right itself, are unique in that they may be irretrievably lost by the mere passage of time.

For this reason the right to a speedy trial is a present and continuing right, one which may be asserted before trial in order to prevent the completed violation of the right. There is an "affirmative constitutional obligation to bring [an accused] promptly to trial," as well as a right to dismissal

if a prompt trial is not provided. Compare Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973) with Strunk v. United States, 412 U.S. 434, 439-40 (1973). See also Smith v. Hooey, supra at 383; Klopfer v. North Carolina, 386 U.S. 213, 219-22 (1967).

The court below held:

> "'Speedy' is a relative word, which may properly be interpreted differently for one who is at large. Since an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process of law." Opin., p. 15 (citations omitted).

Because "speedy" is a relative term and the exact point at which the right is fully denied cannot be pinpointed, the District Court declined to hold that indictees in Brooklyn had already been denied speedy trials and were therefore entitled to dismissal. Instead, it fashioned prophylactic relief to prevent the delays from ripening into the completed denial of a speedy trial and the denial of due process that inheres in excessive pretrial detention.

Speedy trial claims are generally evaluated according to a balancing test comprising four factors: The length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972); cf. United States ex rel. Solomon v. Mancusi, 412 F. 2d 88, 90 (2d Cir.), cert. denied, 396 U.S. 936 (1969). Although there is no finding of a completed denial of the right, and strict application of the Barker test is inapposite,

these factors should also guide the inquiry as to the need for prophylactic relief.

1. Length of Delay

The Barker Court described the length of delay as a "triggering mechanism": "Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530. This "presumptively prejudicial" period of delay may occur sooner for one who is incarcerated, as is appellees' class, than for one who is at liberty pending trial. The record below makes it painfully clear that there have been, and are now, large numbers of incarcerated persons awaiting trial for long periods of time. By July, 1973 there were 707 jailed defendants awaiting trial for more than six months, an increase of sixty three from the previous December. In March, 1974 the number of persons awaiting trial, according to statistics submitted by the District Attorney was 398.*/ This decrease can be partially attributed to a decrease in the number of arrests and indictments in 1973.

The record below supports the conclusion that despite gestures of concern by the State, little improvement has been made. The District Court found that serious backlogs

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*/ The information submitted by the District Attorney was submitted ex parte and could not be tested as to reliability by appellees.

in Kings County court calendars persisted into the month of the order. (Opin., p. 12, 14).

It is clear that these delays, routine as they are in Kings County, are "presumptively prejudicial" to plaintiffs' class and therefore justify inquiry into the other relevant factors. In Thorne v. Warden, Brooklyn House of Detention for Men, 479 F.2d 297, 299 n. 2 (1973), this Court expressed concern about the number of persons jailed awaiting trial more than six months and more than three months. Two years earlier, in United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1314 (1971), this Court was also concerned with the number of people in jail awaiting trial for more than three months. Of those jurisdictions that impose fixed time limits for trial delay, six months is the maximum permitted. See American Bar Association Project on Standards for Criminal Justice, Standards Relating to Speedy Trial, approved draft 1968 ("ABA Speedy Trial Standards") § 2.1, commentary at p. 15. Clearly, on the record below, the District Court did not abuse its discretion in proceeding to an examination of the other relevant factors.

2. Reasons for the Delay

The reasons for delay in bringing an accused to trial are vitally important. It is clear that when the prosecutor intentionally delays the trial in order to hinder the defense, there is a prima facie denial of a speedy trial. United States v. Marion, 404 U.S. 307, 325 (1971). Where the defense is primarily responsible for the delay, then the accused has a great burden to demonstrate a denial of a speedy

trial. Cf. Frizer, supra at 1318 (Friendly, J., concurring).

The Barker Court held that factors such as negligence or overcrowded courts, the conditions described as chronic by this Court in Frizer, supra at 1315, should be weighed against the prosecution, since ultimate responsibility for those conditions must rest with the government. 407 U.S. at 531. "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." Id. at 528 (footnotes omitted).

The Frizer Court recognized 18 principal causes of delay, 11 of which bear directly on the ability of the state to move cases through the system, including manpower shortages and shortages in court facilities, and found that: "There has been egregious failure on the part of numerous public officials to anticipate the problems and to adopt measures necessary for their solution or easing." Id. at 1316. Two years later, in Thorne, supra, this Court again commented on the serious conditions in Kings County and found the situation worse than in 1970. This in spite of the fact that the State poured $6,700,000 into the criminal justice system for more court-rooms and court personnel, much of that money earmarked for Brooklyn. However, Mr. Gallagher testified that there still aren't enough facilities to give everyone prompt trials. (M, 373).

Today, there are still about 400 people in jail in Brooklyn who have waited more than six months without a trial. The words of Mr. Justice White, concurring in Barker, supra,

are particularly compelling with regard to the situation in Kings County:

> "...[U]nreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and each case must await its turn. As the Court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws." 407 U.S. at 538.

3. Assertion of the Right

Of great importance is the question of whether the defendant actually wants a prompt trial. The Barker Court specifically rejected the "demand waiver" rule, but substituted a test based on the defendant's assertion of the right. 407 U.S. at 528. The record below contains many instances of speedy trial requests made and forgotten. (Opin., p. 7). The Court below considered an affidavit listing six inmates who had been in jail from eight to twenty months awaiting trial and who had filed an aggregate of fourteen unsuccessful speedy trial motions. Prisoners who testified at the hearings recounted similar histories. The Legal Aid Society was equally unsuccessful in obtaining speedy trials through motions submitted en masse. This evidence shows that members of appellees' class frequently attempt to assert their right, but to no avail. More is not required.*/

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*/ It should be noted that the order below places great weight on assertion by requiring persons to request a speedy trial before they are protected by the terms of the order.

4. Prejudice to the Defendant

Permeating the question of speedy trial is the prejudice resulting from lengthy delays. Clearly that prejudice is greater when the accused is in jail than when he is at liberty. The Barker Court observed:

> "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." 407 U.S. at 532.

See also Moore v. Arizona, 414 U.S. 25, 27 (1973).

The relevance of this analysis to appellees' class, is supported by the uncontradicted and unimpeached testimony of Dr. Sheldon Cholst, a psychiatrist working at the Brooklyn House of Detention, and Professor Bernard Segal. Dr. Cholst testified that prolonged pretrial incarceration creates tremendous anxiety among appellees' class and the pretrial detainees suffer a suicide rate 25 times as high as the general population and suffer twice as many breakdowns as the general population.

Professor Segal testified that the prejudice to an incarcerated person awaiting trial increases materially after about three months. This prejudice includes irretrievably lost time and freedom; excessive anxiety and concern; personal hardship including loss of employment and disintegration of family relationships; substantial impairment of the lawyer-

client relationship and of the ability to present a legal defense; and coercion to accept a guilty plea rather than to claim the right to a trial, even if there are believable defenses to the charges. The District Court found that prolonged pretrial incarceration is so prejudicial to appellees and to their ability to obtain a fair trial as to threaten their rights to due process and to a speedy trial.

Appellees seek to vindicate their present and continuing right to speedy trials. They have shown that present conditions in Kings County are inimical to their rights. If those conditions are permitted to continue unabated, in spite of this Court's admonitions, their rights will be irrevocably lost.

B. The Excessively Long Pretrial Incarceration Complained of Violates Appellees' Rights to Due Process of Law Under the Fifth and Fourteenth Amendments.

When government restricts a constitutional right, it must do so in the least drastic way available. Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Liberty, of course, is the most fundamental right a person possesses, and a deprivation of liberty to one who is presumptively innocent must be kept within narrow bounds. The only constitutionally acceptable reason for pretrial detention is to assure the accused's appearance at trial. Cf. Stack v. Boyle, 342 U.S. 1 (1951); United States v. Foster, 278 F.2d 567, 570 (2 Cir. 1960), cert. denied 364 U.S. 834 (1960). Any restriction on detainees must be reasonably related to that purpose and limited to what is necessary to accomplish it. Inmates of Suffolk County Jail v. Eisenstadt,

360 F. Supp. 676, 685 (D. Mass. 1973). A pretrial detainee may be subjected only to the minimum restrictions that are inherent in confinement itself. Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (D. Wis. 1973); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971); Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971). Those cases held that jail conditions that were unnecessarily restrictive and oppressive denied pretrial detainees the due process of law.

The loss of liberty itself is surely of more concern than the incidents of detention. This fact is underscored by the harsh and drastic effects of extended pretrial detention as shown by the record and accepted by the Court below. If needlessly stringent conditions of detention violate due process, needlessly long pretrial incarceration is a fortiori unconstitutional. The state does not and cannot assert any defensible reason for its failure to provide prompt trials. Its failure to lift this intolerable burden is thus gratuitious as well as cruel.

Appellees and their class are untried prisoners confined because they cannot buy their freedom by posting bail. Theoretically clothed with the presumption of innocence, they remain in jail for periods often exceeding a year, without a judicial determination of guilt or innocence. (Cf. Cheff v. Schnackenberg, 384 U.S. 379, 379-80 [1966], which held it a denial of due process to impose a sentence of criminal contempt in excess of six months without a jury trial.) Appellees' personal hardship is matched by the prejudice to their legal

defense and the coercion to plead guilty inherent in such long incarceration. This is, in the most basic sense, a violation of the concepts of fundamental fairness we call the due process of law.

POINT II

THE RELIEF ORDERED BY THE COURT BELOW IS APPROPRIATE UNDER EQUITABLE PRINCIPLES TO PROTECT PLAINTIFFS' CONSTITUTIONAL RIGHTS WITHOUT SACRIFICING THE STATE'S LEGITIMATE INTERESTS.

The essence of equity jurisdiction is the Court's ability to fashion relief appropriate to the necessities of the case before it, to frame its decrees with flexibility rather than rigidity. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). This traditional view of equity was recently reaffirmed in Lemon v. Kurtzman, 411 U.S. 192, 200 (1973):

> "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Swann v. Charlotte-Mecklenburg, etc., Board of Education, 402 U.S. 1, 15, 27 n. 10 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable...
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> * * * *
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> "In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots." (per Burger, C.J.)

See also Mitchell v. Robert DeMario, 361 U.S. 288, 291 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 397-98 (1946).

The same principles govern disputes between private

persons and official agencies. "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, supra at 329. See also Brown v. Board of Education (II), 349 U.S. 294, 300 (1955).

The use of equitable principles to vindicate constitutional rights has in the past led to federal court intervention in state court systems. Pugh v. Rainwater, 483 F.2d 778 (5th Cir.), cert. granted, 94 S.Ct. 595 (1973). (mandatory injunction requiring preliminary hearings for arrestees held upon information); Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1973) (injunction against discriminatory selection of jurors); Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972) (injunction against prosecuting indigents absent proper appointment or waiver of counsel). See also Conover v. Montemuro, 477 F. 2d 1073 (3d Cir. 1973) (en banc) (upholding federal courts' power to grant equitable relief against unconstitutional family court intake procedures); Long v. Robinson, 436 F. 2d 1116 (4th Cir. 1971) (declaratory judgment holding unconstitutional the prosecution of certain 16 to 18-year-old persons as adult offenders).

The kind of mandatory injunctive relief sought by appellees has been granted by federal courts in many other areas. The assurance of fair elections, traditionally a state function, was considered so important by the Fifth Circuit that it justified federal judicial scrutiny of state voter registration. Alabama v. United States, 304 F. 2d 583 (5th Cir.), aff'd. mem. 371 U.S. 37 (1962). Federal courts have issued

broad injunctions prohibiting police harassment, Hairston v. Hutzler, 334 F. Supp. 251 (W.D. Pa. 1971); Houser v. Hill, 278 F. Supp. 920 (M.D. Ala. 1968); widespread illegal police searches of homes, Langford v. Gelston, 364 F. 2d 197 (4th Cir. 1966); and the arbitrary stopping of automobiles by state troopers, Lewis v. Kugler, 446 F. 2d 1343 (3d Cir. 1971). The court in Kugler acknowledged that "a federal court should avoid unnecessarily dampening the vigor of a police department by becoming too deeply involved in the department's daily operations," but stressed that the substantial threat of constitutional violations required the district court to "draw upon its wide experience, history, and the recommendations of responsible parties" to "fashion an appropriate remedy that will protect the constitutional rights of citizens." Id. at 1351-52. Finally, the constitutional rights of state prisoners have been protected by a growing number of federal courts. Gomes v. Travisono, 42 U.S. L.W. 2368 (1st Cir. Dec. 28, 1973) (due process requirements for interstate transfer of state prisoners); Khecht v. Gillman, 488 F. 2d 1136 (8th Cir. 1973) (use of apomorphine as "aversive stimulus" except under narrowly defined consent held unconstitutional); Sostre v. McGinnis, 442 F. 2d 178, 203-04 (2d Cir. 1971) (en banc), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049 (1972) (prisoners' right to possess literature and to send and receive mail); Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967) (unconstitutional conditions of confinement). The obligation to protect prisoners' rights is particularly solemn in the case of pretrial detainees entitled to the presumption of innocence. Anderson v. Nosser, 438 F. 2d 183, 190 (5th Cir. 1971); Inmates of Suffolk County

Jail v. Eisenstadt, 360 F. Supp. 676, 685-86 (D. Mass. 1973); Inmates of Milwaukee Jail v. Peterson, 353 F. Supp. 1157, 1159-60 (E.D. Wis. 1973); Brenneman v. Madigan, 343 F. Supp. 128, 135-38 (N.D. Cal. 1972). These cases, involving both prohibitive and mandatory relief, reflect a federal judiciary sensitive to constitutional wrongs and to its statutory power and duty to remedy them.

The District Court's order is well within its equitable jurisdiction. It does not establish a new constitutional speedy trial rule. The object of the relief is to correct practices that endanger the rights of a class of pretrial detainees. Whether a person's Sixth Amendment rights are violated in a particular case so as to merit dismissal of the charges against him must be determined under the balancing test of Barker and not with reference to any fixed schedule.

Here, however, the system has been found to routinely cause excessive pretrial delay for incarcerated persons. A class of detainees faces the continuing threat of serious violation of their Sixth Amendment rights and of their rights to due process of law. Under these circumstances, a fixed time schedule may be used as the basis for framing a remedy to prevent further excessive delay and avert the incipient deprivation of plaintiffs' rights. That relief in no way implies a substantive constitutional right to a trial within a set period of time. Such an assertion mistakes the

remedy for the right.*/

The time schedule prescribed in the District Court's order does not imply that anyone suffering a longer delay is constitutionally entitled to dismissal of his charges. Nor does it mean that one who is tried under the District Court's order is foreclosed from claiming a denial of speedy trial on the facts of his own case. These individual questions are governed by the balancing test of Barker and should be litigated in the first instance in the state court.

Appropriateness of Class Relief

Class-based relief is appropriate in this case. Class actions under the civil rights statutes are, of course, familiar.**/ F.R.Civ.P. 23(b) (2), Notes of Advisory Committee. Challenges to the constitutionality of state court practices may be brought as class actions. Pugh v. Rainwater, Conover v. Montemuro, Long v. Robinson, Gilliard v. Carson, Penn v. Eubanks, all supra. Class actions have been maintained by pretrial detainees on numerous occasions. Rhem v. Malcolm, Civ. No. 70-C-3962 (S.D.N.Y. 1974); Inmates of Suffolk County Jail v. Eisenstadt, supra; Brenneman v. Madigan, supra; Hamilton v. Schiro, 328 F. Supp.

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*/ This distinction was recognized by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24-25 (1971). In that case the lower court had imposed a school desegregation plan whose basis was a racial ratio in each school similar to the citywide ratio. The Supreme Court held that, while there was no substantive constitutional right to any particular degree of racial balancing, mathematical ratios might be used as a starting point in framing an equitable remedy for the particular circumstances.

**/ If this action were to be construed as in the nature of habeas corpus-a construction plaintiffs reject, see Point III, infra- class relief would still be appropriate. The availability of class relief in habeas corpus under proper circumstances is well established. See Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973); Mead v. Parker, 464 F.2d 1108,1112 (9th Cir. 1972); Gesicki v. Oswald, 336 F.Supp. 371 (S.D.N.Y. 1971) (three judge court), aff'd. 406 U.S. 913 (1972).

1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971). The appropriateness of class action treatment of this case under F.R.Civ.P. 23(b)(2) and 23(b)(3) in order to provide meaningful relief was determined by the District Court over a year ago when it denied the state's motion to dismiss, Memorandum and Order, E.D.N.Y., February 27, 1973, pp. 16-18. (This order was not appealed.) It was again discussed by the court in its opinion granting the preliminary injunction (Opin., pp. 16-18). The comment in Barker v. Wingo, supra, about the ad hoc and individual nature of speedy trial determinations is inapposite. Where an individual alleges a completed violation and seeks dismissal or reversal, the judgment must be based on the peculiar circumstances of his case. Then, individual matters predominate over circumstances a defendant might share with others. Here, however, appellees assert their present right to a speedy trial and ask to be tried, not to have their charges dismissed. All of them are incarcerated awaiting trial and suffer similar prejudice as a result. The delays complained of are due to the state's failure to provide resources and facilities adequate to the existing backlog of cases. This presents a case where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding statutory relief with respect to the class as a whole" and where "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and... a class action is superior to other available methods" of

resolution. F.R.Civ.P. 23(b)(2), 23(b)(3). Since the relief below does not involve dismissal of indictments, and since appellees do not seek to litigate the merits of their criminal prosecutions in this action, no questions affecting only individual members are presented at all. The state's arguments against class relief are therefore frivolous.

In addition, seeking relief individually in the state courts would at best result in trial preferences for a few; Cf. People ex rel. Franklin v. Warden, supra. As this Court noted in Thorne v. Warden, supra, at 299 n.2, "a preference granted to one defendant prejudices the rights of those scheduled to be tried ahead of him under the foregoing system, since they must wait that much longer until the 'preferred' case is tried." If enough preferences are given, even the preferred cases will have to wait and the remedy will be entirely meaningless. Individual remedies, even if successful, are inimical to the rights of parties not before the court and of the class as a whole. This is therefore a case where a class action presents "a method by which the common claims of a group of petitioners may be properly litigated without endangering the individual rights of the class..." Williams v. Richardson, supra, at 361.

The Equities

The remedy below meets the basic equitable test of fairness to the parties by protecting plaintiffs' rights while respecting the ligitimate interests of the state. Appellees complained that they could not get speedy trials in Kings County; the lower court ordered that trials be provided within a reasonable time for those who request them. The relief is

designed to facilitate orderly compliance. It takes effect first for the longest incarcerated, somewhat later for the other affected persons. For persons charged with murder, a longer period of delay is permitted before the order takes effect. Adjournments requested or consented to by the defendant, toll the period within which the trial must begin, as do the pendency of certain other proceedings concerning the defendant, such as psychiatric examinations. Nor does the order affect the requirements of detainers or warrants lodged against a defendant by the parole board, authorities in other jurisdictions, or other official agencies.

Realizing that the state might fail to provide timely trials for all those affected, by choice or by inadvertence, the District Court provided an alternative means of compliance. Persons not tried within the allotted time would be released on their own recognizance pending trial in order to mitigate the extreme prejudice resulting from excessive pretrial incarceration. However, the state criminal proceedings would not be dismissed, stayed, or otherwise interrupted. Nor is the state subjected to any inflexible prescription as to the order which it must try cases. Thus the District Court has established a remedial standard intended to prevent the deprivation of Sixth Amendment rights but at the same time has left the state considerable discretion as to the means of meeting that standard and has not seriously burdened the state's substantial interests in its criminal proceedings.

Moreover, the time periods provided in the order are eminently reasonable. The basic provision is that a person detained over six months is to be tried within 45 days after

he submits a written request for a prompt trial. This time is extended under various circumstances, as noted supra. This relief is much more conservative than the two-month limit proposed by Professor Segal (T. 86). Pertinent rules and recommendations also demonstrate the reasonableness of the order. This Court's Rules for the Prompt Disposition of Criminal Cases require an incarcerated defendant to be tried within 90 days or released on his own recognizance, and delay exceeding six months entitles a defendant to dismissal. No jurisdiction that has a fixed-schedule prompt trial rule permits more than six months from indictment to trial, and two, Massachusetts and Pennsylvania, require trial or dismissal within six months of imprisonment. See ABA Speedy Trial Standards, supra, commentary at p. 15, for a partial listing of these rules.

While these rules have no independent standing as constitutional requirements, they show conclusively that the requirements of the District Court's order are reasonable and do not constitute an abuse of its remedial discretion.

POINT III

PRINCIPLES OF FEDERALISM DO NOT BAR THE RELIEF GRANTED BY THE DISTRICT COURT

The Civil Rights Act under which this action was brought provides a remedy for the deprivation of constitutional rights by persons acting under color of State law. 42 U.S.C. § 1983. The statute was designed "to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerence or otherwise," a state might fail to take such steps as were necessary to vindicate rights guaranteed by the Fourteenth Amendment. District of Columbia v. Carter, 409 U.S. 418, 428-429 (1973).

> "It is clear from the legislative debates surrounding passage of Sec. 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or judicial,' Ex parte Virginia, 100 U.S. .335, 346, 25 L.Ed. 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. Those who opposed the act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights.
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> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the

> vindication of those rights; and it believed that these failings extended to the state courts." Mitchum v. Foster, 407 U.S. 225, 240, 241-242 (1972).

Since the Act of 1875, the Supreme Court has emphasized, the federal courts have been "the primary and powerful reliances for vindicating every right given be the Constitution, the laws and treaties of the United States," Frankfurter and Landis, quoted in Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis supplied by Court). One of the aims of the statute was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S. 167, 174 (1961). This, of course, is precisely appellees' complaint.

Certain judge-made doctrines of restraint have developed around this statutory mandate under the general rubric of comity. See Younger v. Harris, 401 U.S. 37 (1971); Preiser v. Rodriguez, 93 S. Ct. 1827 (1973). These doctrines are intended to protect the orderly functioning of state judicial process against interruption by premature federal intervention. This policy has no relevance if the state process itself is inadequate to protect federal rights. Where state courts cannot be relied upon to vindicate those rights, deference to state process is unnecessary and inappropriate.

This case presents such a situation. Appellees allege that their rights to a speedy trial and to freedom from undue pretrial incarceration are violated by the excessive trial delays routinely suffered in Kings County. They have shown below that assertion of their rights in the state courts has been fruitless and that the nature of the injury is such that post-conviction remedies are inadequate redress even if

successful. These circumstances raise none of the reasons for federal restraint that underly policies of comity. The District Court was obligated to fulfill its Congressional mandate and protect appellees' constitutional rights.

Inapplicability of Younger v. Harris

Younger v. Harris, supra, held that where a pending state prosecution offers the defendant adequate opportunity to vindicate his federal rights, federal judicial deference to a court of coordinate sovereignty is appropriate absent "extraordinary circumstances." The issue is not one of jurisdiction or power to decide a case, Mitchum v. Foster, supra, but of equitable restraint out of respect for ligitimate state functions. The decision therefore depends on an evaluation of the merits of the plaintiffs' claims and the adequacy of the state forum to protect them. Both the facts and the remedy of the instant case are far removed from the circumstances of Younger and from the reasons underlying federal deference in that case.

Younger involved a challenge by a state criminal defendant to the statute under which he was being prosecuted. The Supreme Court held it inappropriate for the federal court to interpose itself between the defendant and the state disposition of his case in order to judge the facial overbreadth of the statute.

In order to justify such intervention, the plaintiff would have to show "great and immediate" irreparable injury.

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution could not by themselves be considered

> 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. Younger v. Harris, supra, at 46.

An incidental "chilling effect" on First Amendment activities was held to be insufficient in itself to overcome the interests of comity. Only a statute "'...flagrantly and patently violative of express constitution prohibitions...'", a showing of "...bad faith, harassment, or ...other unusual circumstance(s)...would call for equitable relief." Id. at 53-4.

This case is not governed by Younger because none of the policies underlying Younger are implicated. The issue here is the constitutionality of the inordinate trial delays suffered by incarcerated criminal defendants. No statute is challenged, on its face or as applied. The District Court's order does not make any conduct unpunishable not affect in any way the State's implementation of C.P.L. §30.30 (the "ready rule"). The relief therefore does not involve the impact on the legislative process which Younger, supra, at 52-53, warned against.*/ The remedy, here in fact, supports the state's ability to enforce its laws. Cf. Barker v. Wingo, supra, at 538 (White, J., concurring).

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*/ Similarly, the Third Circuit recognized that the substance of a constitutional challenge to the intake procedures of Philadelphia Family Court was

> "...that the persons charged with the administration of the statute [were] exercising their power in an improper way, and not that the statute, properly construed, required the allegedly improper practices." Conover v. Montemuro, supra, at 1076.

More important, the order does not interrupt a single criminal case in the State courts nor in any way interfere with dispositions on the merits. The Younger holding was directed to the injunction of a pending state prosecution because the disruption caused by removing the merits of the controversy to federal court seriously undercuts the state's legitimate power. Thus in Conover v. Montemuro, supra, at 1080, the court noted that injunctive relief was available where the federal adjudication would not involve a ruling on an issue which might determine or influence the merits of a state prosecution.*/

As the Fifth Circuit stated recently:

> "...[W]e have not declined to adjudicate federal questions properly presented merely because resolution of these questions would affect state procedures for handling criminal cases. Where, as here, the relief sought is not 'against any pending or future court proceedings as such,' Fuentes v. Shevin, 407 U.S. 67, 71 (1971), Younger is inapplicable." (emphasis in original). Pugh v. Rainwater, supra, at 781-82.

See also Penn v. Eubanks, supra, where a challenge to systematic jury discrimination was held cognizable since injunctive relief was not sought against specific prosecutions. Cf. Hobbs v. Thompson, 448 F.2d 456, 467 (5th Cir. 1971).

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*/ Although the threat of racially discriminatory practices by two state court judges was held to be too attenuated to satisfy the requirements of Article III in O'Shea v. Littleton, 42 U.S.L.W. 4139, (January 15, 1974). The Supreme Court warned, in dicta, that the relief contemplated "...would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio..." The District Court's order here contemplates no such disruption, nor does it interfere with discretionary judicial functions.

As the Younger Court stated, its doctrine of restraint was intended to support policies of federalism and to "prevent erosion of the role of the jury and avoid duplication of legal proceedings and legal sanctions..." Younger, supra, at 44. It was not intended to nullify the statutory mandate of Section 1983 as to state judicial systems.

Since Younger is not applicable, its high standards of injury are not required for federal equitable relief here, either. Similarly, since the state juvenile defendants in Conover v. Montemuro, supra, at 1080-82, did not seek to "...halt or substantially interfere with a pending prosecution," the propriety of federal relief was to "...be governed by general legal or equitable considerations."*/

The instant case is similar, since the decision below does not interrupt state proceedings, nor affect the adjudication of the merits of any prosecution, nor undercut the state's interest in the integrity and enforcement of its criminal statutes.

Although the Younger standard is inapplicable to the instant case, appellees' injuries are nonetheless "great and immediate" as well as irreparable. The harm suffered by appellees is discussed supra and need not be reiterated. This

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*/ Compare cases where Younger is inapplicable because only future prosecutions are involved. Steffel v. Thompson, 42 U.S.L.W. 4357, 4360-61, (March 20, 1974); Lake Carriers' Assoc. v. MacMullan, 406 U.S. 498, 509 (1972); Boraas v. Village of Belle Terre, 476 F.2d 806, 811 (2d Cir. 1973), rev'd. on other grounds, 42 U.S.L.W. 4475 (April 2, 1974).

harm is "...above and beyond that associated with the defense of a single prosecution brought in good faith..." Younger v. Harris, supra, at 48. To consider such pretrial delay for persons in jail "normally incident" to a criminal defense is to admit that a state system may function in contravention of the Sixth and Fourteenth Amendments with impunity. The State's pervasive and systematic denial of the right to speedy trial amounts to the "official lawlessness" excepted in Younger. While no bad faith is alleged, the State practices have the same continuing, adverse effects on appellees.

> "In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from...the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights." Id. at 57 (concurring opinion).

As has been demonstrated, theoretical state remedies provide no effectual redress for the individual. (see Opin. pp. 16-17). Individual motions, when even considered, are almost invariably futile. Furthermore, the delay involved in any such proceeding vitiates any favorable results. Even when the infrequent drastic relief of dismissal is awarded at trial under Strunk v. United States, supra, it does not compensate for the losses incurred by excessively long incarceration. Pugh v. Rainwater, supra, at 782; Rakes v. Coleman, 359 F. Supp. 370, 379 (E.D. Va., 1973). Cf. Morgan v. Wofford, 472 F.2d 822, 826 (5th Cir., 1973). As the court noted of the habeas corpus alternative in Gilliard v. Carson, supra, at 762:

> This alternative is manifestly inadequate because no remedy is available until after irreparable damage has been sustained and may,

> because of the time necessarily involved in such proceedings, prove unavailable at all.

The only legal remedy which could protect appellees' present right to a speedy trial is one which could be asserted prior to trial and which could prevent the violation. Moreover, as a matter of public policy, the relief granted here is actually superior to assertion of the right as a defense, since it is prospective and prophylactic and does not cause indictments to be dismissed without regard to guilt or innocence.

If State remedies are illusory on an individual basis, they do not even address the injury to appellees as a class. Yet the proportions of the injury here must be seen as co-extensive with the unconstitutional practices: the widespread incidence of past and continuing injury establishes the certainty of future injury to other members of the class. Pugh v. Rainwater, supra, at 787; Gilliard v. Carson, supra, at 762. Cf. Medrano v. Allee, 347 F. Supp. 605, 618 (S.D. Tex., 1972) (three judge court), probable jurisdiction noted, 411 U.S. 963 (1973).

The highest State court has refused to deal with the magnitude of the injury caused: its tolerence of present conditions amounts to an assessment that the system is operating constitutionally. In 1971, the New York Court of Appeals judged congestion a "good cause" for trial delays, from which defendants were not entitled to relief. People v. Ganci, 27 N.Y. 2d 418 (1971). Thereafter the Supreme Court held that "...the ultimate responsibility for such circumstances

must rest with the government rather than with the defendant." Barker v. Wingo, supra, at 531. In 1973, trial preferences were granted to four out of 400 defendants on whose behalf the Legal Aid Society had brought speedy trial motions, although no Sixth Amendment violation was found. See Franklin v. Warden, supra, at 502-504. The Court of Appeals recognized the limits of such relief without considering the constitutionality of class deprivations:

> We recognize that the four cases now before us are typical of the vast pretrial felony backlogs in the County of Kings and perhaps to a lesser degree in other metropolitan counties...
>
> It may be urged that the disposition we make in the cases now before us is unfair to other detainees similarly situated in Kings County. We would only note that it does not appear that all or any of such other detainees actually desire to go to trial. Additionally, petitions for writs of habeas corpus in other cases will undoubtedly be considered both in the lower courts and in our court in the light though not in mechanical duplication of our decision today.

But the injuries undisputed at the District Court hearing are pervasive and certain. Individual trial preferences which prejudice other members of the class equally deserving of relief are by definition inadequate to the class-wide deprivation. Because the source is the process itself, individual state court judges cannot effect an adequate class remedy.

Furthermore, as the District Court noted (Opin., pp. 17 ff.), "the hostility of New York State Courts to class actions makes it impossible to obtain effective state relief where a large number of prisoners are suffering similar loss of rights."

In contrast, where the enforcement of a state statute is challenged, the individual criminal defense can afford an indirect remedy for others: if the statute is judged unconstitutional, they will not be prosecuted under it. But where the deprivations are part of the accepted, if deplored, conditions incidental to virtually every defense, and the injuries to incarcerated defendants are magnified many times, the relief must be systemic to be real.

Where the injuries inhere in the normal functioning of the State criminal justice system, then, the inadequacy of that system to redress them is manifest. Where the State courts are the perpetrators of constitutional deprivations, their practices are no longer entitled to be immune from federal scrutiny. As the Fifth Circuit commented in Dixon v. Florida, 388 F.2d 424, 426 (1968):

> "The concept of federal-state comity involves mutuality of responsibility, and an unacted upon responsibility can relieve one comity partner from continuous deference."

Finally, the finding of inadequacy of the state forum to vindicate the federal rights claimed is essentially undisputed, that is, there is no factual basis on which to conclude that federal deference to state proceedings is appropriate. As the Supreme Court noted in Gibson v. Berryhill, 411 U.S. 564, 577 (1973):

> Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a Younger v. Harris dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it.

The correctness of the District Court's conclusion in that case was reviewed under the following standard:

> "As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it." Id. at 579.

The District Court's injunction in the instant case is based on a well-supported finding that state statutes as interpreted by the state's highest court deny plaintiffs a remedy, that available relief in individual cases cannot adequately protect even the individuals involved and is totally meaningless applied to the class as a whole. The prerequisite for federal self-restraint is therefore lacking and the relief granted is properly within the Court's equitable powers under 42 U.S.C. §1983.

Inapplicability of Preiser v. Rodriguez

Appellants' contention that appellees have failed to exhaust their state remedies under Preiser v. Rodriquez, misreads that case.

In Preiser, supra, the Supreme Court held that certain actions falling within the "traditional scope" of habeas corpus could not be raised under other statutes. "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus." 93 S. Ct. at 1841. This action falls outside the ambit of Preiser, it is a class action aimed at

reformation of certain practices in the Kings County Courts. Though class actions are now permissible in habeas corpus, the traditional scope of the writ was confined to individuals' challenges to the legality of their own custody and not broad challenges to state policies or practices. 93 S. Ct. at 1833-1835. The only connection between this action and the traditional scope of habeas corpus is that release on recognizance might under some circumstances be granted in both. Moreover, this action seeks prompt trials rather than release from custody. Release on recognizance is incidental to the enforcement of that right and need not be granted to anyone if the State tries appellees within a reasonable time. Can appellants seriously contend that this overlapping of possible remedies ousts the court of its §1983 jurisdiction?

The relief granted in no way blocks the prosecution of the men involved. Those who are convicted and sentenced to state prisons will serve the sentences imposed regardless of their pretrial status. The cause of action was properly brought under §1983 and the District Court's order was an appropriate remedy to the widespread constitutional violations found.

This narrow reading of Preiser is consistent with its own language and with subsequent cases. Certiorari was granted

> "...to consider the bearing of [Wilwording v. Swenson, 404 U.S. 249 (1971)] upon the situation before us - where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconditionally deprived of good time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement." 93 S. Ct. 1832. (emphasis supplied).

Wilwording v. Swenson, of course, reaffirmed generally that the Civil Rights Act is supplemental to the state remedy and that "[S]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. Shortly after Preiser, the Supreme Court sustained §1983 jurisdiction in Miller v. Gomez, 93 S. Ct. 2728 (1973), summarily aff'g 341 F. Supp. 323 (S.D. N.Y. 1972) (3 judge court), a class action by state prisoners complaining of improper pretrial commitment in a prison hospital rather than a civil facility. The dissenting judge had objected that the case was properly cognizable only in habeas corpus. See also Blouin v. Dembitz, 489 F.2d 488, 491 (2d Cir. 1973).

Even if Preiser did apply, it would make no difference to the present case. The court below observed that Preiser "merely held that the exhaustion requirement of 28 U.S.C. §2254 (b) in a habeas corpus proceeding could not be avoided by labeling the proceeding as a civil rights action under 42 U.S.C. §1983." That requirement is inapplicable where

> "...it appears...that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. §2254(b).

The absence or ineffectiveness of State remedies is the gravamen of appellees' contentions and has been discussed extensively supra. The District Court found that State remedies were wholly inadequate and ineffective to cure the wrong complained of, and these findings "are not to be set aside unless clearly erroneous," F.R. Civ. P. 52(a). It is well

established that the exhaustion requirement does not command the performance of a futile act. Roberts v. LaVallee, 389 U.S. 40, 43 (1967); Lucas v. People of the State of Michigan, 420 F. 2d 259 (6th Cir. 1970). The District Court properly found that the exhaustion requirement, even if applicable, would not bar the present action.

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING A PRELIMINARY INJUNCTION

Generally the function of a preliminary injunction is preservation of the status quo. National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971); Checker Motors Corp. v. Chrysler Corp. 405 F.2d 319, 323 (2d Cir. 1969). But if the status quo, i.e., lengthy trial delays, is exactly what will inflict the irreparable harm, then a mandatory injunction is the proper remedy. National Association of Letter Carriers v. Sombrotto, supra; Toledo A.A. &.N.M. Ry. Co. v. Penn Co., 54 F. 730, 741 (C.C.D.N. Ohio 1893) (Taft, J.). Issuance of a preliminary injunction is a matter of discretion for the trial judge*/ and depends on four factors: likelihood of success on the merits; irreparable injury to appellees if they are not tried within a reasonable time; harm to appellants if they accord prompt trial to members of appellees class; and, the public interest in prompt trials of criminal accused. First Citizen Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir. 1970); Weber v. Continental Motors, 305 F. Supp 404 (S.D.N.Y. 1969).

Likelihood of success on the merits

Appellees need not demonstrate an absolute certainty of success, but need only raise serious and substantial questions

*/ That action will not normally be upset on appeal absent a clear showing of abuse of discretion not present here, Checker Motors Corp. v. Chrysler Corp., supra.

going to the merits. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953); Checker Motors Corp. v. Chrysler Corp., supra.

Appellees have met this burden. The record below clearly shows that 1) appellees suffer unconscionable delays in their trials; 2) that the delays are due for the most part to reasons beyond their control but within the control of the State, and which the State has a duty to remedy but has not; Frizer v. McMann, supra, Thorne v. Warden, supra; 3) that it is futile for criminal defendants to assert the right in the State court see supra; and, 4) the fact of lengthy pretrial incarceration is inherently prejudicial to both the State and the accused, Barker v. Wingo, supra.

Irreparable Injury to Appellees

It is axiomatic that plaintiffs must demonstrate irreparable harm to warrant the court granting a preliminary injunction. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929).

Just as confinement in punitive segregation while litigation is pending constitutes irreparable harm because each day confined in irretrievably lost and cannot be adequately compensated, Sostre v. Rockefeller, 309 F. Supp 611 (S.D.N.Y. 1969), so does each day confined awaiting trial.

The prejudice from lengthy delay has been well documented here and in other cases that have considered the problem. Barker v. Wingo, supra, Smith v. Hooey, supra, Moore v. Arizona, supra.

Harm to appellants

The Supreme Court, reversing the denial of a preliminary injunction in Ohio Oil Co. v. Conway, supra, stated at p. 815:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while, if the injunction be granted the injury to opposing party even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

The legal and practical interests of all parties in securing speedy trials coincide. Appellants have no legitimate interest in not bringing criminal prosecutions promptly to trial. For the State to claim the contrary is not only absurd but, as demonstrated supra, on its face violates the Sixth Amendment.

Moreover, even if appellees are not ultimately successful the injury to appellants, if any, if interim relief is granted, will be slight. Ohio Oil Co. v. Conway, supra. Hopefully, significant number of detainees will be tried or their cases otherwise disposed of while the injunction is in force. Defendants who are not promptly tried and who are temporarily released from incarceration remain subject to the jurisdiction and process of the State Supreme Court.

The public interest

The strong public policy favoring speedy trials was stated by the Supreme Court in Barker v. Wingo, supra at 518:

> "The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."

In describing this interest Mr. Justice Brennan emphasized factors going to efficiency in the criminal justice system: the ability of the accused to defend himself, the State's ability to prove its case, and the deterrent value of those convictions that are obtained. Dickey v. Florida, 398 U.S. 30, 42 (1970) concurring opinion). This Court expressed similar concerns in announcing its own prompt trial rules:

> "The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason,,public confidence is seriously eroded. */

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*/ Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.

The defendant's confidence in the system of justice is also eroded by long delays. As Professor Segal testified:

> "It is amazing how much a client forgets about his own case after months and months pass by. Also in the beginning, he believes in his lawyer. He believes in the legal system, and he feels that he has these constitutional rights that he knows about. The longer he sits in jail, he becomes more indifferent, much more remote." (W2, 91).

The effects of lengthy incarceration on the defendant and the attendant social costs were also discussed by the majority in Barker, supra, at 521-522:

> "If an accused cannot make bail, he is generally confined ... in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions 'has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.' At times the result may even be violent rioting. Finally, lengthy pretrial detention is costly... In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners." (Footnotes omitted).

The lower court's order does no more and no less than to realize a public policy of considerable importance, one that has been thwarted by the failure of the Kings County Supreme Court to provide prompt trials.

CONCLUSION

The relief below was timely, in light of the history of the problem. The failure of New York City's criminal justice system to dispose of its caseload promptly has been a subject of public debate for some years.

As early as June 30, 1969, the Legal Aid Society stated in a memorandum to the then Administrative Judges of the New York Criminal Courts:

> "It is our opinion that if the present system is not changed to permit more effective disposition of the increasing caseload within the very near future the court system will be hopelessly overburdened, causing a complete breakdown in the administration of justice." (Quoted in Association of the Bar of the City of New York, supra at p. 52).

Similarly, a year later Edwin Q. Carr, Jr., the Attorney-In-Charge of the Legal Aid Society, reiterated the Society's fears at a Board of Estimate public hearing, stating that:

> "The signs of that crisis ... are an increasing inability to dispose of cases, intolerable delays for all parties (complainants, defendants, witnesses)and fearful congestion in the City's jails."Id. at 53.

This Court granted en banc consideration in United States ex rel. Frizer v. McMann, supra, due to the important questions it raised, and when the case was decided in early 1971, the Court, per Lumbard,C.J., noted:

> "While the present condition in the metropolitan counties is frequently described as an 'emergency' its progress has been certain and notorious for the past few years. Thus, the situation is more accurately described as chronic." Id. at 1315.

Several months later, on May 3, 1971, the Administrative Board of the Judicial Conference adopted its speedy trial rules, supra. Before they became effective the legislature passed CPL 30.30, which provided no remedy for delay caused by court congestion. (Supra)

The record below attests to the inadequacy of remedies in the State Supreme Court to confront the dimensions of the problem. (Opin., pp. 16-19).

The Legal Aid Society brought a test case to the New York Court of Appeals in response to the problem. People ex rel. Franklin v. Warden, supra. The Court of Appeals, rather than speaking to the repeated problem of court congestion, ordered trial preferences for the four petitioners. The inadequacy of trial preferences as a remedy was noted by this Court in 1973 in the case of Thorne v. Warden, supra, at 299, n. 2.

It was in this historical context that the District Court was compelled to act. (Opin., pp. 6-8). A situation involving great harm to the rights of criminal defendants and to public policy had been permitted to go on unchecked for a period of years despite judicial and legislative admonitions in Frizer, supra and elsewhere. Under the circumstances, neither equitable restraint nor the public interest required the court to stay its hand. This court in Thorne expressed the hope "that the serious conditions disclosed by the record in this case will be eliminated by the State's provision of additional judges, facilities and personnel needed to enable the State judiciary to afford a speedy trial to each accused person who is incarcerated pending trial." Supra at 300. This hope has not been realized.

As Judge Judd observed, "This is a situation where

the federal court may dispense with the process of 'waiting for Godot.' St. Jules v. Beto, ..." Opin., p. 16.

In recognition of that understanding, the order and opinion of the District Court should be affirmed.*/

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of April, 1974, one copy of the enclosed APPELLEE'S BRIEF, was personally served on:

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